M. PALANIAPPA CHETTIAR

v.

ST. SITHAMBARAM CHETTIAR & ORS.
& OFFICIAL ADMINISTRATOR, MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
WAN HAMZAH J
[PROBATE SUIT NO. 2 OF 1978]
21 JANUARY 1985

SUCCESSION: *Probate - Contested will - Existence and validity - Compromise between parties in earlier suit in foreign Court - Terms of compromise contradictory to alleged will - Effect of consent order made by foreign Court - Estoppel - Res judicata.*

The issue here revolves around the existence and validity of a will executed by the deceased father of the plaintiff and the 1st and 2nd defendants. 3rd and 4th defendants are the sons of the 1st defendant. All of the defendants contest the validity of the will. The plaintiff is asking for an order that the alleged will be accepted as the valid last will of the testator that it be registered in this Court and that probate of the will be granted to him as executor. The main contention of the defendants (as set out in para. 14 and 15 of their statement of defence) is that the plaintiff is estopped by *res judicata* from querying the existence or the validity of the alleged will.

Earlier on in 1972, the 1st defendant has instituted proceedings in the Court of Subordinate Judge, Pudukkottai, India, whereby the 1st defendant challenged the validity of the alleged will. However, when the suit was part heard the plaintiff and defendants came to an agreement about the shares of the parties in the joint family properties in India and Malaya. The terms of this compromise were contradictory to the provisions of the alleged will. This compromise was made a rule of the Pudukkottai Subordinate Court and it is on this basis that the defendants claim that the plaintiff is now estopped from querying the existence/validity of the alleged will.

Prior to the 1972 proceedings, the 1st defendant had (in 1969) instituted proceedings related to the appointment of the Official Administrator as the manager of the estate of the testator pending grant of representation. In 1972, the plaintiff (who was the respondent in 1969) applied for stay of proceedings until the outcome of the proceedings in the Indian Court. After the compromise was recorded in India, Azmi J dismissed the application for stay of proceedings and held that the alleged will was not valid in view of the decree of the Indian Court. The plaintiff is now contending that the alleged will be accepted as the valid last will of the testator.

Held:

[1] The issue before Azmi J was whether the alleged will was valid in view of the decree of the Indian Court in terms of the compromise. That issue is also an issue in the present case. Azmi J decided that the alleged will was not valid in view of that decree. Therefore it is not proper to consider and determine the same issue again. (see *Yap Liang Neo v. Tan Yew Gee & Anor.* [1936] MLJ 141).

[2] The plaintiff is estopped from making use of the alleged will by his previous conduct by which he had abandoned it. By entering into the compromise the plaintiff had abandoned the alleged will and this implies a promise not to make use of the alleged will in future.

[3] Pursuant to the arrangement the 1st defendant had acted on the implied promise of the plaintiff to the 1st defendant's disadvantage and because of this the plaintiff is estopped from resiling from the terms of this compromise.

[Plaintiff's claim in Probate Suit No. 2 of 1978 dismissed with costs. Plaintiff's petition for Probate No. 360 of 1969 dismissed.]

Cases referred to:
Yap Liang Neo v. Tan Yew Ghee & Anor [1936] MLJ 141
Central London Property Trust Ltd. v. High Trees House Ltd. [1947] 1 KB 130

For the plaintiff - Palasundram; M/s. Lawrence & Joseph
For the 1st, 3rd and 4th defendants - Sri Ram; M/s. Sri Ram, Zulkifly & Kumar
For the 2nd defendant - C. V. Das; M/s. Shook Lin & Bok

JUDGMENT

Wan Hamzah J:

On 31 March 1968 a man known as PL. MR. Murugappa Chettiar (to whom I shall refer as Murugappa) executed in India a document which purported to be his last Will. I shall refer to it as the alleged Will. The plaintiff is a son of Murugappa and was in the alleged Will appointed the executor. The alleged Will was then registered in India. On 28 February 1969 Murugappa died in India. By this probate suit the plaintiff asks for an order that the alleged Will be accepted as the valid last Will of Murugappa and that it be registered in this Court. The plaintiff also asks that probate of the alleged Will be granted to him as the executor named in it.

The first and the second defendants are also the sons of Murugappa. The third defendant and the fourth defendant are the sons of the first defendant. All of the defendants oppose the plaintiff's application on several grounds. All of them contest the validity of the alleged Will. The first, third and fourth defendants filed a joint statement of defence and counterclaim. The second defendant filed a separate statement of defence and counterclaim. This judgment is not concerned with the Statement of Defence and Counterclaim of the Second defendant, but with the statement of defence of the first, third and fourth defendants, and references hereafter to joint statement of defence are references to the joint statement of defence of the first, third and fourth defendants. In para. 14 of the joint statement of defence the first, third and fourth defendants contend further that even if the alleged Will was valid, it does not exist for probate by reason of the facts and circumstances set out in that paragraph. In para. 15 they contend that by reason of the admissions of Counsel for the plaintiff and of the decisions of competent Courts as set out para. 14 the plaintiff is estopped by *res judicata* from agitating the existence or the validity of the alleged Will. On 29 October 1980 they obtained an order from this Court that the following issue be tried as preliminary issue, i.e. whether upon the facts pleaded in para. 14 and 15 of their statement of the defence the plaintiff is prevented by the application or the operation of the doctrine of estoppel or *res judicata* from contending that the alleged Will is valid, or from applying for probate of the alleged Will.

Some of the facts pleaded in para. 14 and 15 of the statement of defence relate to the proceedings in the Court of Subordinate Judge, Pudukkottai, India, commenced by the first defendant. In those proceedings the plaintiff and the defendants in the present case were parties, and the first defendant challenged the validity of the alleged Will and claimed the properties purported to be disposed of by the alleged Will to be joint family properties. On

29 June 1972 when the suit was part heard the plaintiff and the defendants compromised the said suit by agreeing *inter alia* that the first, third and fourth defendants should be entitled to a one-third share in all the joint family properties in India and Malaya and other properties referred to in the alleged Will, and that the plaintiff and the second defendant should also be entitled to one-third share each in the said properties. Thus the terms of the compromise are contradictory to the provisions in the alleged Will. The compromise was made a rule of the Pudukkottai Subordinate Court. The plaintiff does not dispute these facts. It is contended by the defendants that by reason of these facts the plaintiff is estopped from agitating the existence or validity of the alleged Will.

In originating motion No. 35/1969 Sithambaram (the first defendant herein) applied for the appointment of the Official Administrator as the manager of the estate of the deceased Murugappa pending grant of representation. Palaniappa, the plaintiff herein, was named as the respondent in that originating motion. On 2 February 1970 a consent order was made for the appointment of the Official Administrator as the manager pursuant to the motion. On 6 April 1970 another consent order was made containing a number of terms, some of which were the Administrator *Pendente Lite* should forthwith take possession and assume control and management of the deceased's business at No. 68, Jalan Raya Barat, Klang and the moveable and immoveable properties of the deceased's estate, and that the three sons of the deceased should have the liberty to inspect the inventories and accounts to be delivered pursuant to order and account books and other documents of the estate. On 13 September 1971 pursuant to the application of Sithambaram (the first defendant herein) an order was made that Palaniappa (the plaintiff herein) should file into the Court a statement of account under O. 33 r. 2 of the then Rules of the Supreme Court and all interested persons should file surcharge and falsification of the account for enquiry by the Court. On 17 January 1972 the Court made a further order consequential to the order of 13 September 1971 to fix the time for filing statement of account and for filing surcharge and falsification. All the above orders were made in originating motion No. 35/1969. On 7 April 1972 Palaniappa (the plaintiff herein) applied in that originating motion for an order that all further proceedings therein be stayed and in particular the said order of 17 January 1972, until the outcome of originating summons No. 57/1969 filed in the Subordinate Court, Pudukkottai, India. On 29 June 1972 a compromise was made in originating summons No. 57/1969 in the Indian Court and the terms of the compromise were recorded which were inconsistent with the provisions in the alleged Will. After hearing the application for stay of proceedings on 27 December 1972 Azmi J (as he then was) dismissed the application. The following is a passage in the judgment of Azmi J showing some of the grounds of his decision to dismiss the application for stay of proceedings:

> In his supplementary affidavit sworn on 27 October 1972, Mr. Thayalan in support of the respondent's application has annexed xerox copies of the preliminary decree passed by the subordinate Court in India. At pp. 14 and 15 of the Court records under the heading "Joint endorsement by the parties" and also at pp. 5 and 6 of the proceedings held on 29 June 1972 under the heading "Terms of joint endorsement", the terms of the preliminary decree are as follows:
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> > The parties agree that the plaintiff and his sons shall be entitled to an one third share in all the joint family properties in India and in Malaya (as detailed in the plaint) and also to such of these as are referred to in the Will; that the 1st and 2nd defendant shall similarly be entitled to an one third share each in the said property; that the legatees and the beneficiaries under the Will left by the father Murugappa Chettiar shall be entitled to what has been bequeathed to them under the Will except the sons of the plaintiff and the

> 2nd defendant in as much as the plaintiff and the second defendant are allotted to an one third share each. First defendant to render accounts of his management. A preliminary decree may be passed in these terms and the parties may be given liberty to apply for the appointment of a commissioner to take accounts and effect a division according to the preliminary decree. The parties may be directed to bear their own costs.

> ... it should noted that the applicant brought the suit in India primarily for the purpose of challenging the validity of the Will. If the Will was held valid in India, then that would be the end of the applicant's case both here and in India since under the Will he had been totally excluded. In my judgment, the respondent (who was a defendant in India) by consenting to give the applicant and his sons one-third share of the estate has by inference admitted that the Will is invalid. On the proper construction of the Indian preliminary decrees, I am inclined to the view that the subordinate Court in India has not in fact recognised the Will. If the Will have been held valid, then the applicant could not have any interest in any part of the estate. As stated earlier on, the applicant's Originating Motion in this Court is concerned mainly with the property of the deceased in Malaysia, including the moneylending firm in Klang. The interim relief sought by the applicant was granted by Yong J on 2 February 1970 primarily because the validity of the Will had been challenged in India. In the words of Mr. Thayalan as contained in para. 4 of his affidavit dated 29 March 1972 in support of the present application, "The applicant abovenamed has been excluded from the said Will and it is for this reason the applicant has embarked on this prolonged litigation both in India and here in Malaysia". But in his submissions, Mr. Thayalan has now conceded that the applicant in fact has an interest in the estate. If so, then it is clear that the Will could not have been valid, and the applicant's protection that all the properties are joint Hindu family properties and not self-acquired properties has all along been well founded.

It is clear from the above passage that one issue before Azmi J was whether the alleged Will was valid in view of the decree of the Indian Court in terms of the compromise. That issue is also an issue in the present case. Azmi J decided that the alleged Will was not valid in view of that decree. Therefore it is not proper for me now to consider and determine the same issue again. If I were to make a different decision on the same issue my decision will be of no effect. Where there are two conflicting judgments by the same Court on the same matter between the same parties the second judgment must be treated as a nullity: *Yap Liang Neo v. Tan Yew Ghee & Anor*. [1936] MLJ 141 (Reprint 113). The answer to the question in this case must be the same answer which Azmi J decided and gave in O. M. 35/1969.

On behalf of the plaintiff it was argued that the defendants fail on the preliminary issues on following grounds:

1. Lack of jurisdiction of the foreign Court according to the private international law of Malaysia makes the foreign judgment unenforceable and unrecognisable by the Court of Malaysia. The order of the foreign Court in so far as it affects directly or indirectly immovable properties situated in Malaysia, e.g., a Will in so far as it disposes of immovable properties situated in Malaysia, or title to immovable properties situated in Malaysia, or partition of immovable properties situated in Malaysia, will not be recognised or enforced by the Court of Malaysia.

2. Any foreign judgment in order to found a *res judicata* or estoppel in Malaysia must be *res judicata* in the country in which it was pronounced.

3. By the laws of India probate jurisdiction is vested in District Courts and High Courts only and a Subordinate Court has no probate jurisdiction.

4. By the laws of India the judgment of any Court other than a probate Court cannot be pleaded in bar of proceedings for probating a Will.

5. As the law of England as administered in England prior to 1 January 1959 or as at 7 April 1956 had not developed the principle of issue estoppel to be applicable to foreign judgments, issue estoppel in respect of foreign judgments is not part of the law of Malaysia and is not a bar to claims in Malaysian Courts.

6. The Subordinate Court of Pudukkottai had no jurisdiction even under the laws of India to entertain the O.S. No. 57/1969 or to pass the preliminary decree dated 26 September 1972 in so far as they affected immovable properties outside India. Therefore, that preliminary decree has no validity in the private international law of Malaysia in so far as immovable properties in Malaysia are concerned. The said preliminary decree is, therefore, not *res judicata* or estoppel in Malaysia.

7. The Court cannot pronounce against a Will by consent. The consent of parties interested proves nothing. No person's consent can make a will not a will.

8. There is no final decree in O.S. NO. 57/1969 of the Subordinate Court Pudukkottai. Without a final decree there cannot be *res judicata* or estoppel in the case of a foreign judgment.

All of the above grounds should have been argued before Azmi J at the time when he was hearing the application for stay of proceeding in originating motion No.35/1969, or in an appeal against his judgment, but appeal against his judgment was withdrawn.

There is another reason why the plaintiff fails in this suit. He is estopped from making use of the alleged Will by his previous conduct by which he had abandoned it. Where parties enter into an arrangement which is intended to create legal relations between them and in pursuance of such an arrangement one party makes a promise to the other which he knows will be acted on and which is in fact acted on by the promisee, the Court will treat the promise as binding on the promisor to the extent that it will not allow him to act inconsistently with it: *Central London Property Trust Ltd. v. High Trees House Ltd.* [1947] 1 KB 130. By entering into the compromise the plaintiff had abandoned the alleged Will, and this implies a promise not to make use of the alleged Will in future. Pursuant to the arrangement, the first defendant in the present case (who was the plaintiff in O.S. No. 57/1969 in the Indian Court) acted on the implied promise of the plaintiff to his (first defendant's) disadvantage in that under the compromise he allowed the legatees and the beneficiaries under the alleged Will to have what was bequeathed to them, whereas one ground of his claim in that case was that the alleged Will had been brought about by fraud and undue influence and if he had not entered into the compromise arrangement he might have succeeded in showing fraud and undue influence; and if he succeeded, the legacies under the alleged Will would revert to the deceased's estate for distribution to him and other beneficiaries on intestacy.

For the above reasons the plaintiff's claim in this Probate Suit No.2 of 1978 is dismissed, with costs to the defendants. The plaintiff's petition for probate in Petition for Probate No. 360 of 1969 is also dismissed.

Also found at [1986] 1 CLJ 430